Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–95–91
GUNN CHIT TUAN, EDGAR JOSEPH JR AND EUSOFF CHIN SCJJ
21 DECEMBER 1992

Constitutional Law *— Habeas corpus — Allegation that detainee had been assaulted — No evidence produced — Dangerous Drugs (Special Preventive Measures) Act 1985*

The appellant had been detained under the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985. An application for habeas corpus was made relying upon the ground that the appellant had been assaulted during the period of detention at the police station pending enquiries The only evidence relied on was the affidavit of the sister of the appellant filed in support of the application. There was no affidavit in denial. The learned judge found as a fact that the appellant had been assaulted as alleged but he dismissed the application for habeas corpus on the ground that habeas corpus was not the remedy where a detainee was proved to have been assaulted. The appellant appealed.

Held, dismissing the appeal:

(1) The concession by the senior federal counsel that the fact of assault should be regarded as common ground was mistakenly made because the bare allegation of assault made in the affidavit by the appellant's sister was worthless as evidence, being entirely hearsay. As there was no evidence that the appellant had been assaulted, there is nothing to rebut and so no need for an affidavit in denial.

(2) The factual foundation for the point of law advanced by counsel for the appellant, to wit, the alleged assault, was absent and therefore the appeal must be dismissed.

[Bahasa Malaysia summary

Perayu telah ditahan di bawah Akta Dadah Berbahaya (Peruntukan Pencegahan Khas) 1985. Suatu permohonan untuk habeas corpus telah dibuat atas alasan bahawa perayu telah diserang semasa beliau ditahan di balai polis sementara menunggu penyiasatan. Permohonan itu hanya berasaskan afidavit kakak perayu yang difailkan sebagai menyokong permohonan itu. Tidak terdapat afidavit yang menafikannya.

Hakim yang arif mendapati sebagai fakta bahawa perayu telah diserang seperti yang dikatakan tetapi beliau telah menolak permohonan untuk habeas corpus atas alasan bahawa habeas corpus bukan remedi apabila orang tahanan dibuktikan telah diserang. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Konsesi oleh peguambela kanan persekutuan bahawa fakta serangan itu patut dianggap sebagai titik persamaan adalah salah kerana tuduhan serangan yang dibuat di dalam afidavit oleh kakak pemohon adalah tidak berguna kerana ia sepenuhnya dengar cakap. Oleh kerana tidak ada keterangan menunjukkan bahawa perayu telah diserang, tidak terdapat apa-apa yang perlu dinafikan dan oleh itu tidak perlu afidavit menafikannya.

(2) Asas fakta untuk perkara undang-undang yang dikemukakan oleh peguambela perayu, iaitu tuduhan serangan itu, tidak wujud dan oleh itu rayuan mestilah ditolak.]

Cases referred to

1 *Middleweek v Chief Constable of the Merseyside Police and Anor* [1990] 3 All ER 662 (refd)
2 *Weldon v Home Office* [1990] 3 All ER 672 (refd)
3 *Lau Lek Eng & Ors v Minister for Home Affairs, Singapore & Anor* [1972] 2 MLJ 4 (refd)
4 *Kidar Nath v State of Punjab* AIR 1960 Punj 122 (refd)
5 *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45; [1988] 2 MLJ 301 (refd)
6 *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1990] 3 All ER 687; [1991] 3 All ER 733 (HL) (refd)
7 *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 (SC) (refd)
8 *Cooke v New River Co* (1888) 38 Ch D 56 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2), 6(1), 11A(1)

Appeal from: Application No 44–187–90 (High Court, Penang)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Balia Yusof bin Haji Wahi (Deputy Public Prosecutor) (*Norbahari bin Baharuddin* (DPP) with him) for the respondents.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): The appellant had been arrested on 13 September 1990 pursuant to the provisions of s 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). On 10 November 1990, pursuant to the provisions of s 6(1) of the Act, the Deputy Minister for Home Affairs signed and issued a detention order authorizing her detention for a period of two years at the Pusat Akhlak, Pulau Jerejak, Penang, and thereafter, on 9 November 1992, pursuant to the provision of s 11A(1) of the Act, he directed that the duration of the order be extended for a further period of two years at the same place.

Counsel for the appellant, Encik Karpal Singh, had applied to the High Court, Penang, for an order of habeas corpus relying only upon one ground, namely, that during the period of detention pending enquiries at the Taiping Police Station, pursuant to the provisions of s 3(2) of the Act, the appellant had been assaulted by unidentified police personnel, on an unspecified date, and so the conditions of her detention were such as to render her continued detention wrongful. The only material relied upon in support of the allegation of assault was an affidavit of her elder sister, Teoh Siew Hoi, affirmed on 18 December 1990 and filed in support of the application, but because there was no affidavit of denial filed in opposition thereof, the learned judge in the court below, found as a fact that the appellant had been assaulted as alleged. To be fair to the learned judge it should also be added that before the application for habeas corpus was filed, the solicitors for the appellant had written a letter dated 28 September 1990 addressed to the OCPD, Taiping, complaining — and here we would quote its actual words — 'we understand that our client had been assaulted while under detention', but it evoked no reply.

In the court below, Encik Karpal Singh had relied heavily on the English Court of Appeal cases of *Middleweek v Chief Constable of the Merseyside Police and Anor*[1] and *Weldon v Home Office*,[2] but the learned judge said that they were distinguishable because neither was a habeas corpus case; they being actions for damages for false imprisonment by convicted persons in respect of incidents during their confinement. Instead, he considered that the Singapore case of *Lau Lek Eng & Ors v Minister for Home Affairs, Singapore & Anor*[3] was more to the point and he relied, in particular, on the following passage in the judgment of Wee Chong Jin CJ:

> The other grounds relied on by the applicants in support of their application for habeas corpus relate to the manner and conditions of their detention and not to the legality of their detention under the Act. In my judgment, on those grounds, habeas corpus is not an available remedy and I would dismiss the application with costs.

In the event, the learned judge dismissed the application for habeas corpus on the ground that habeas corpus was not the remedy where a detainee was proved to have been assaulted and from that decision the appellant has appealed to this court.

Before us, Encik Karpal Singh had again placed reliance upon the cases of *Middleweek*[1] and *Weldon*[2] as well as the Indian case of *Kidar Nath v State of Punjab*[4] and the local case of *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor*[5] affirmed on appeal to the Supreme Court.

The proposition of law in *Koh Yoke Koon*[5] that every step in the process of detention must be followed with extreme regularity by the executive otherwise the continued detention of the detainee would be illegal, was especially stressed by counsel.

We would interject to remark that *Weldon*[2] went on appeal by the Home Office to the House of Lords, where it was heard together with another appeal, namely, *R v Deputy Governor of Parkhurst Prison & Ors, ex p Hague*,[6] the prisoner being the appellant.

In *Weldon's* case,[2] the prisoner claimed damages for false imprisonment in respect of his confinement overnight in a strip cell in the prison in which he was serving a sentence. He alleged that his clothes had been taken from him, he was forced to remain until the following morning and had been unlawfully assaulted by certain police officers. The Court of Appeal dismissed an appeal against the decision of the assistant recorder refusing to strike out the action in respect of his confinement in the strip cell on the ground that the facts disclosed an arguable case of false imprisonment either because he had been unlawfully deprived of his residual liberty or that he had been kept in intolerable conditions.

In *Hague*,[6] the prisoner had sought judicial review of the decision of the deputy governor of Parkhurst Prison to segregate him and thereafter to transfer him to Wormwood Scrubs Prison for continued segregation, and of the decision of the board of visitors of Wormwood Scrubs Prison to authorize his continued segregation for 28 days. The Court of Appeal refused to quash the decisions and dismissed his claim for damages for false imprisonment.

In the event, the House of Lords reversed the decision of the Court of Appeal in *Weldon*[2] whilst affirming the decision of that court in *Hague*.[6] The House of Lords also disapproved of the dictum of Ackner LJ (as he then was) in *Middleweek*[1] that a person lawfully detained in a prison cell would cease to be so lawfully detained if the conditions in the cell were such as to be seriously prejudicial to his health if he continued to occupy it.

On the other hand, senior federal counsel Encik Balia Yusof bin Haji Wahi, on behalf of the respondents, had cited the case of *Theresa Lim Chin Chin & Ors v Inspector General of Police*[7] where Abdul Hamid CJ (as he then was), sitting alone, had cited with approval the case of *Lau Lek Eng*[5] in the following terms:

> Suffice it to say that I did not find the conditions of detention alleged sufficient to constitute harsh or cruel treatment and therefore this objection failed. In any event, even assuming they did, I am constrained to say that it would not come within the range of cases where habeas corpus would issue. In *Lau Lek Eng & Ors v The Minister for Home Affairs, Singapore & Anor* [1972] 3 MLJ 4, Chief Justice Wee Chong Jin said that habeas corpus is not an available remedy to an application relating to manner and conditions of detention. I am inclined to subscribe to that view. The remedy may perhaps lie elsewhere.

We consider that having regard to the particular circumstances of the present appeal, it is unnecessary for us to determine the point of law advanced by Encik Karpal Singh for reasons we shall now state.

It is true that before us, Encik Balia Yusof did not attempt to attack the finding of the learned judge that the appellant had been assaulted and, indeed, in answer to a question by the court, he categorically stated that for purposes of this appeal the fact of assault should be regarded as common ground since there was no affidavit of denial. Accordingly, the appeal was argued before us on the basis that the finding of the learned judge that the appellant had been assaulted as alleged was correct.

In our view, the concession by Encik Balia Yusof that the fact of assault should be regarded as common ground since there was no affidavit of

denial, was mistakenly made because the bare allegation of assault made in the affidavit of the appellant's sister was wholly unsupported by any evidence, there being no suggestion that she was herself present at the time of the alleged assault. A

Consequently, the allegation of assault by the appellant's sister was worthless as evidence being entirely hearsay.

Similarly, in the absence of a confirmatory affidavit by the appellant, the letter of her solicitors dated 28 September 1990 which, we would repeat in passing, says 'we *understand* that our client had been assaulted while under detention', instead of the common form 'we have been *instructed by our client* etc,' (emphasis added) suffers from the same defect. B

It follows, therefore, that there being not a scrap of evidence that the appellant had been assaulted, there was nothing to rebut and so no need for an affidavit of denial. C

We need hardly add that the mistaken concession by Encik Balia Yusof that the fact of assault should be regarded as common ground, is in no way binding on this court. If he was mistaken then his error cannot oblige this court to follow that view. D

Accordingly, the learned judge's finding of assault was plainly wrong.

In these circumstances, the factual foundation for the point of law advanced by counsel for the appellant, to wit, the alleged assault, was conspicuously absent. In view of this, anything we might say on the point would be merely obiter dicta and so we express no opinion upon it. E

We are fortified in the course we are taking by the words of Bowen LJ in *Cooke v New River Co*[8] 'obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the judges who have uttered them, and are a great source of embarassment in future cases'.

The result therefore is that this appeal must be and is dismissed. F

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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